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No. 06-760

In the Supreme Court of the United States

KATHI COOPER, ET AL., PETITIONERS,

v.

IBM PERSONAL PENSION PLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

A defined benefit pension plan violates ERISA's prohibition against age discrimination "if, under the plan, the rate of an employee's benefit accrual is reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H).

The questions presented are:

1. Whether "the rate of an employee's benefit accrual is reduced, because of the attainment of any age," under a cash balance formula in which all employees earn pay credits and interest credits to their retirement accounts at the same rate, regardless of age.

2. Whether "the rate of an employee's benefit accrual is reduced, because of the attainment of any age," under a transition formula in which all employees with the same salary and service history are given the same opening retirement account balance, regardless of age.

No other court of appeals has decided either question; IBM Corporation has frozen its cash balance plan; and the Pension Protection Act of 2006 provides, prospectively, that cash balance plans like IBM's comply with 29 U.S.C. § 1054(b)(1)(H).

RULE 29.6 STATEMENT

International Business Machines Corporation ("IBM") has no corporate parent. No publicly held company owns 10 percent or more of IBM Corporation's stock.

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STATEMENT

Petitioners, a class of current and former IBM employees, seek review of a decision of the Seventh Circuit rejecting their claims that the IBM Personal Pension Plan and a related transition formula discriminate against employees on the basis of age in violation of ERISA. The Seventh Circuit held that the IBM Plan is not age-discriminatory merely because the younger an employee is when he starts his retirement account, the more interest he will accumulate by age 65.

The IBM Plan is a type of defined benefit plan known as a "cash balance" plan. The plan maintains a retirement account for each participating employee. The account is similar to a savings account that accumulates regular savings and interest. Each month, the plan adds a "pay credit" (a percentage of pay) and an "interest credit" (a percentage of the account balance) to the employee's account. All employees earn pay credits and accrue interest at the same rate, regardless of age. Any two employees who work for the plan sponsor for the same number of years and at the same salary will have the same account balance when their service ends, regardless of age.

If an employee's service ends before age 65, and the employee elects to defer receipt of his benefit until age 65, the plan will continue adding interest credits to the employee's account until the employee reaches age 65. The plan adds these interest credits to reflect the time value of money: The credits prevent the employee's retirement benefit from losing its economic value between the time it is earned and the time it is paid. If one employee works for the plan sponsor from age 35 to age 50, and another from age 50 to age 65, the younger employee will accumulate more interest on his account by age 65 than will the older employee, because the younger employee must wait 15 years longer to receive his benefit at age 65.

The district court held that IBM's cash balance plan is age-discriminatory because the younger employee will accumulate more interest by age 65. Pet. App. 21-22, 25. In effect, the court held that *interest* is age-discriminatory. The Seventh Circuit disagreed. The court of appeals held that the younger employee's accumulation of more interest is not "age discrimination" but merely reflects the fact that the younger employee waits longer to receive his benefit and earns interest over a greater number of years. *Id.* at 4. The court stressed that IBM's cash balance formula is age-neutral as to pay credits and interest credits. *Id.* at 2-3, 4-6, 11-12.

When IBM introduced its cash balance plan, it gave each employee an opening account balance. The Plan calculated an employee's opening balance using two transition formulas and gave the employee the larger of the balances yielded by the two formulas. One of the formulas, the "always cash balance" formula, provided an employee with an opening account balance approximately equal to the balance that the employee would have had if the cash balance plan had always been in effect. Under this formula, any two employees with the same salary and service record received the same opening account balance, regardless of age. If the "always cash balance" formula yielded a larger amount than the alternative formula, the employee was given that amount. The district court invalidated the "always cash balance" formula, *id.* at 42; the Seventh Circuit reversed, holding that the formula was not age-discriminatory, *id.* at 12.

1. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), governs two basic types of retirement plans: "defined contribution plans" and "defined benefit plans." ERISA §§ 3(34)-(35), 29 U.S.C. §§ 1002(34)-(35). In a defined contribution plan, an employee's retirement benefit is the balance in an account maintained for the employee. The employee's account balance is the employee's share of the contributions made to the plan by the employer and/or the employee, adjusted to

reflect the plan's investment experience. *Id.* § 1002(34). A defined benefit plan is any other retirement plan. *Id.* § 1002(35). Under a defined benefit plan, an employee's retirement benefit generally is based on a benefit formula rather than amounts contributed to the plan. A defined benefit plan is responsible for paying a defined benefit regardless of the plan's investment performance.

A "cash balance plan" is a type of defined benefit plan that expresses an employee's retirement benefit as an account balance consisting of pay credits and interest credits. 26 C.F.R. § 1.401(a)(4)-8(c)(3). A cash balance plan resembles a defined contribution plan, except that an employee's benefit does not depend on the plan's investment performance or on the contributions made to the plan. Pay credits are added to the employee's account at a rate equal to a percentage of the employee's pay; interest credits are added by applying an interest rate to the accumulated account balance. A vested employee who ends his employment before reaching normal retirement age (typically age 65) may elect to receive his retirement benefit immediately or defer receipt until normal retirement age, or later if the plan permits.[1] Interest continues to accrue until the benefit is paid. IRS Notice 96-8, 1996-1 C.B. 359, 1996 WL 17901, at *2 (Feb. 5, 1996).

Cash balance and similar plans today cover nearly one in three participants in defined benefit plans. Between 2001 and 2004, the number of such plans grew from 1,225, with seven million participants, to nearly 1,800, with ten million participants. In 2001, such plans covered 20.5 percent of all defined benefit plan participants; in 2004, they covered 30 percent of all such participants. These plans have flourished even while the overall number of defined benefit plans has declined. In 1985, there

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[1] ERISA generally defines "normal retirement age" as age 65. ERISA § 3(24), 29 U.S.C. § 1002(24).

were 112,206 defined benefit plans; in 2005, there were only 28,796. Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2005*, at 58, 61-62 (2005), *available at* http://www.pbgc.gov/docs/2005databook.pdf.

2. The Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 12, 81 Stat. 602, 607 (1967) (codified as 29 U.S.C. § 621 *et seq.*) ("ADEA"), forbids employment discrimination based on age. When ERISA was enacted in 1974, the ADEA protected only employees under age 65, and employers could mandate retirement at age 65. Under ERISA, employers did not have to provide pension benefits for services rendered past normal retirement age. See H.R. Conf. Rep. No. 99-1012, at 378 (1986) ("1986 House Report"), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023.

In 1978, Congress amended the ADEA to raise the minimum mandatory retirement age to age 70. Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189-90 (1978). Disagreement arose about whether the ADEA, as amended, required plans to provide pension benefits for services rendered after normal retirement age. See 1986 House Report at 378. In a 1978 bulletin, the Department of Labor, which initially administered the ADEA, stated that the ADEA permitted pension plans "to cease benefit accruals and allocations to an employee's account with respect to employees working beyond the normal retirement age under the plan." *Id.* The EEOC, to which the President transferred authority over the ADEA in 1978, announced an intention, never acted on, "to rescind the Department of Labor's interpretation and require employers to continue benefit accruals" for employees who worked past normal retirement age. *Id.*

In 1986, Congress settled the dispute by striking the age-70 limit in the ADEA, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 1874, 3342 (1986), and amending the ADEA, ERISA, and the Internal Revenue Code of 1986 ("IRC") to prohibit plan sponsors from discontinuing or reducing

benefit accruals for employees who worked past normal retirement age, Pub. L. No. 99-509, §§ 9201, 9202, 100 Stat. 1874, 1973-78 (1986). Section 9202, entitled "Benefit Accrual Beyond Normal Retirement Age," added the new ERISA section, which provides:

> A defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i). Similar sections were added to the ADEA and IRC. ADEA § 4(i)(1)(A), 29 U.S.C. § 623(i)(1)(A); IRC § 411(b)(1)(H), 26 U.S.C. § 411(b)(1)(H). The conference committee stated that the three sections should "be interpreted in a consistent manner." 1986 House Report at 378.

3. Petitioners filed this action on November 1, 1999 in the United States District Court for the Southern District of Illinois. The district court certified the case as a class action on September 17, 2001 and entered summary judgment for Petitioners on July 31, 2003.

The district court held that the IBM Plan violates § 204(b)(1)(H) because a younger employee will accumulate more interest on his retirement account balance by age 65 than will an older employee with the same salary and service record. Pet. App. 21-22, 25. The district court acknowledged that this difference in benefits payable at age 65 makes sense "[f]rom an economist's perspective," because the younger employee has longer to wait to receive his benefit, and "[a] dollar today is worth more than the promise of a dollar a year from now." *Id.* at 24. The district court nevertheless concluded that the Plan is unlawful because, in the court's view, § 204(b)(1)(H) does not permit a defined benefit plan to credit an employee's benefit with interest to reflect the time value of money.

The district court based its view on a construction of the term "benefit accrual" in § 204(b)(1)(H). ERISA does

not define that term. In the absence of a definition, the court gave "benefit accrual" the same meaning as "accrued benefit," which appears several times in § 204(b)(1) but not in § 204(b)(1)(H). See §§ 204(b)(1)(A)-(G), 29 U.S.C. §§ 1054(b)(1)(A)-(G). ERISA defines "accrued benefit" as an employee's accrued benefit "expressed in the form of an annual benefit commencing at normal retirement age," – *i.e.*, an age-65 benefit. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). Because "accr ed benefit" refers to an employee's age-65 benefit, the court reasoned, "benefit accrual" must also refer to an employee's age-65 benefit. So construed, the court continued, § 204(b)(1)(H) bars a defined benefit plan from adjusting an employee's benefit by interest to reflect the time value of money, because a younger employee will earn more interest by age 65 than an older employee. The court supposed that Congress used "benefit accrual" instead of "accrued benefit" in § 204(b)(1)(H) to avoid being grammatically "clumsy." Pet. App. 25. Finally, the district court held that the "always cash balance" formula also violated § 204(b)(1)(H). *Id.* at 37, 39.[2]

4. The Seventh Circuit reversed, rejecting the district court's approach of equating "benefit accrual" with "accrued benefit," *id.* at 6-7, and rejecting its conclusion that IBM's Plan is age-discriminatory because "younger employees receive interest credits for more years," *id.* at 3.

Cash Balance Plan. The Seventh Circuit construed § 204(b)(1)(H) to prohibit a plan, because an employee has

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[2] Before the district court entered its August 16, 2005 judgment, Pet. App. 42-43, the parties settled the other issues in the case. Although Petitioners refer to "[t]he monetary relief [conditionally] awarded to the class with respect to the two issues raised by this Petition," Pet. 12, that amount was not "awarded" by the district court but was "provided in the Settlement Agreement," Pet. App. 42. Respondents did not "stipulate[ ]" that the class was "entitled" to that amount. Pet. 1.

reached any given age, from ceasing, or reducing the rate of, an employee's accrual of benefits. Pet. App. 3. In substance, the court held that a plan sponsor would violate § 204(b)(1)(H) by stopping the addition of pay credits to the employee's account, or by reducing the employee's pay credit (*e.g.*, from five percent to three percent of his salary), because the employee had reached a particular age. Observing that "[t]he IBM plan does neither of these things," *id.*, and that "[a]ll terms of IBM's plan are age neutral," *id.* at 2, the Seventh Circuit – after rejecting Petitioners' contrary arguments – held that the IBM plan "complies with the statute," *id.* at 3.

Noting that the district court had "treated the time value of money as age discrimination," *id.* at 4, the court of appeals stated: "Treating the time value of money as a form of age discrimination is not sensible." *Id.* at 5 (citing *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 611 (1993)). "Here, as so often, it is essential to separate age *discrimination* from other characteristics that may be correlated with age." *Id.* at 11. "Nothing in the language or background of § 204(b)(1)(H)(i) suggests that Congress set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings." Pet. App. 5.

Transition formula. The court of appeals also rejected the district court's holding that the "always cash balance" formula violated § 204(b)(1)(H), noting that the transition formula gave "[e]very employee with the same salary and service record . . . the same opening account balance under the new plan." *Id.* at 12.

5. Following the Seventh Circuit's decision, the President signed into law the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) ("PPA"). Title VII, "Benefit Accrual Standards," added to § 204(b) a new paragraph (5) that ratifies the Seventh Circuit's reading of § 204(b)(1)(H). It provides that a cash balance plan is

not age-discriminatory so long as the "balance of a hypothetical account," as determined on any date, "would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant." PPA § 701(a), 120 Stat. at 981 (adding ERISA § 204(b)(5)(A)(i) & (iv)) Senator Enzi, the Chairman of the Senate Health, Education, Labor, and Pensions Committee and the conference committee, and a floor manager of the Act, stated that the PPA rejected the "confused logic" of treating interest accumulation as age-discriminatory merely "because younger workers could accrue interest on their account over a longer period of time than older workers." 152 Cong. Rec. S8747, S8751 (daily ed. Aug. 3, 2006).

The amendments were made effective June 29, 2005. PPA § 701(e)(1), 120 Stat. at 991 (29 U.S.C. § 1054 (note)). Congress directed that no inference be drawn from the amendments "with respect to . . . the treatment of applicable defined benefit plans or conversions to applicable defined benefit plans before the amendments." PPA § 701(d)(1), 120 Stat. at 991 (29 U.S.C. § 1054 (note)). No court of appeals has yet had occasion to construe the PPA.

6. On January 5, 2006, IBM announced that, as part of a global shift toward defined contribution plans, its defined benefit plans would stop accruing new benefits effective December 31, 2007. Press Release, *IBM Changes U.S. Pension Plans, Effective in 2008, as Part of Ongoing Global Retirement Plan Strategy Shift, at* http://www.03-ibm.com/press/us/en/pressrelease/19090.wss. All benefits earned through year-end 2007 by participants in its cash balance plan will be preserved as of that date. *Id.*

REASONS FOR DENYING THE WRIT

Review should be denied. The court of appeals' decision is correct and does not conflict with any decision of another court of appeals or this Court. As to the lawfulness of cash balance plans, the Pension Protection Act of 2006 resolves the issues in this case for the future; as to the

"always cash balance" transition formula, the decision has little if any significance beyond the parties to this case.

I. THE DECISION BELOW IS CORRECT.

Petitioners assert that review is warranted because the Seventh Circuit's decision is "erroneous," Pet. 13, but the Court's review generally rests on "factors other than the perceived correctness of the judgment below." *Ross* v. *Moffitt*, 417 U.S. 600, 616-17 (1974). Moreover, the Seventh Circuit correctly held that IBM's cash balance plan and transition formula do not violate § 204(b)(1)(H).

Cash Balance Plan. The court of appeals concluded that the IBM Plan complies with § 204(b)(1)(H) because "all terms" of the plan are age-neutral and the plan does not stop the accrual of benefits or change the rate of accrual of benefits because of age. Pet. App. 2-3. The court properly rejected the district court's conclusion that "rate of benefit accrual" in § 204(b)(1)(H) must refer to the rate at which a participant accrues an age-65 annuity. First, because Congress did not use "accrued benefit," a defined term, in § 204(b)(1)(H), it is to be presumed that Congress did not intend to refer to an age-65 benefit. The district court's supposition that Congress used different terms to mean the same thing defies that rule of construction. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Second, equating "benefit accrual" with "accrued benefit" would treat the time value of money as age discrimination; such a result is "not sensible." Pet. App. 4-5, 9. Third, cash balance plans are *required* to credit interest to satisfy a non-discrimination safe-harbor in 26 C.F.R. § 401(a)(4)-8(c)(3), and the preamble to that rule states that interest-crediting in cash balance plans is not age-discriminatory. 56 Fed. Reg. 47,524, 47,529 (Sept. 19, 1991).[3]

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[3] Reading "rate of benefit accrual" to mean "accrued benefit" would also disregard "the evils which gave rise to the statute." *United States* v. *Carbone*, 327 U.S. 633, 637 (1946). The "evil"

The court of appeals also properly recognized that Petitioners' claims failed to demonstrate a reduction in the rate of benefit accrual "because of the attainment of any age," – even if "accrued benefit" were read into § 204(b)(1)(H). Pet. App. 11. To discern whether a reduction in the rate of benefit accrual is actually caused by age, the court of appeals recognized, "it is essential to separate age *discrimination* from other characteristics that may be correlated with age." *Id.* The court of appeals correctly recognized that one need look only at IBM's formula "to rule out a violation" because that formula was "age-neutral." *Id.* "[A]ny differences in pension benefits are a function of differing years of service, salary history, or the years the balance has been allowed to compound; age is not a factor." *Id.* at 10-11.[4]

Petitioners assert that the court of appeals ignored "ERISA's differing regulatory treatment of defined benefit and defined contribution plans." Pet. 24. Not so. The court recognized that there is a regulatory distinction between defined benefit plans and defined contribution plans, but the court also recognized that nothing in § 204(b)(1)(H) would "whimsically require" a court to condemn a cash balance plan as "age discriminatory" for crediting interest when interest is not age discriminatory in defined contribution plans. Pet. App. 10. "[T]hat defined-benefit and defined-contribution plans are governed by different

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that gave rise to § 204(b)(1)(H) was stopping benefit accruals for employees who worked *beyond* age 65. See *supra* at 4-5. It would have made no sense, in legislating against that evil, to protect an employee's benefit *at* age 65.

[4] Petitioners' assertion that cash balance plans "admittedly" provide lower benefits to older employees, and that Respondents "intended" this effect, Pet. 1, is false, and the charts produced by Petitioners, Pet. 7, 9, do not show otherwise. Those charts calculate the "rate of benefit accrual" by reference to an employee's age-65 benefit ignoring the time value of money, the approach that the Seventh Circuit rejected.

subsections of ERISA is not to say that what is lawful for one must be forbidden to the other." *Id.* "Interest is not treated as age discrimination for a defined-contribution plan, and the fact that these subsections [governing defined benefit plans and defined contribution plans] are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either." *Id.* at 4-5.

Finally, the court of appeals' decision is correct because Petitioners' contrary reading would transform into age discrimination the ordinary and uncontroversial practice of crediting interest. There is nothing in the language, purpose, or background of § 204(b)(1)(H) to suggest that Congress intended such a counterintuitive result. The crediting of interest in a defined contribution plan is lawful, and it would make no sense to treat interest as "age discrimination" in defined benefit plans when that practice is undisputedly not age-discriminatory in defined contribution plans or any other facet of the economy.

If Petitioners are correct, then large numbers of traditional pension plans, some in place since the 1930s, are age-discriminatory as well. Indeed, by the district court's reasoning, even Social Security retirement benefits would be considered age discriminatory because they adjust employees' benefits before retirement by the growth in national average wages and younger employees have more time to accumulate such increases than older employees. U.S. Social Security Administration, *Social Security Benefit Amounts, available at* http://www.ssa.gov/OACT/COLA/Benefits.html.[5]

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[5] Time-value-of-money adjustments in retirement benefits are ubiquitous in defined benefit plans. For example, an employee's pension benefit *must* be adjusted for the time value of money when an employee works past age 70½. IRC § 401(a)(9)(C)(iii), 26 U.S.C. § 401(a)(9)(C)(iii). It would make no sense to find that a practice required for older employees is age discriminatory

Transition Formula. Petitioners' Questions Presented suggest that IBM's cash balance plan and IBM's "always cash balance" formula raise distinct issues. Pet. i. The Seventh Circuit did not think so, see Pet. App. 12, and the Petition itself belies that suggestion: its merits discussion addresses only the cash balance plan. Pet. 14-21. Petitioners acknowledge, moreover, that the issue purportedly raised by the transition formula "is more case specific." *Id.* at 14. In fact, in the district court, IBM's expert and its enrolled actuary testified that they did not know of *any* other plans using a similar transition formula.

Petitioners misstate the basis of the Seventh Circuit's rejection of their challenge to the "always cash balance" formula. Contrary to Petitioners' assertion, the court of appeals did not uphold the formula merely because "older workers' vested benefits [were] not decreased." Pet. 29. The court upheld the formula because it was age-neutral and therefore did not violate § 204(b)(1)(H). Pet. App. 11. The court's observation that employers are free to move from one pension design to another as long as vested benefits are not taken away was not a rationalization for holding that the formula complied with § 204(b)(1)(H); it was an explanation of why it was not "material" that the change in the IBM Plan might have disappointed some employees' future hopes and expectations. *Id.* 12.

Petitioners make much of an email from the Plan's enrolled actuary regarding the formula, Pet. 11-12, 28, but Petitioners present the email out of context. Of the two transition formulas used by the IBM Plan, the "always cash balance" formula was age-neutral, while the alternative formula favored older employees. The age-

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when applied to younger employees. Indeed, § 204(b)(1)(H) itself permits plans to adjust employees' benefits by the time value of money to the extent they defer receiving them until after age 65. 29 U.S.C. § 1054(b)(1)(H)(iii)(II).

neutral "always cash balance" formula therefore provided the larger balance only for younger employees who were disfavored by the alternative formula. Older employees tended to receive their opening account balances under the alternative formula, a fact that Petitioners neglect to mention. Even in Petitioners' example, the older employee has an opening balance of $24,775 while the younger employee, similarly situated, has an opening balance of $19,757. Pet. 11. In no event did a younger employee have a larger opening account balance than a similarly situated older employee as a result of the transition.

II. THERE IS NO CIRCUIT CONFLICT.

The Seventh Circuit's decision does not conflict with any decision of this Court or another court of appeals. Indeed, the court's decision is the only decision by a court of appeals to address whether cash balance plans violate § 204(b)(1)(H).

Cash Balance Plans. The court's decision does not conflict with *Esden* v. *Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), *Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), or *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (11th Cir. 2000). Petitioners themselves note that, "[u]nlike the decision below, *Esden*, *Lyons*, and *Miller* did not decide an age discrimination claim under ERISA." Pet. 24. Those cases addressed ERISA's lump sum payment provisions, ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3); 26 C.F.R. § 1.417(e)-1(d)(1). Unlike § 204(b)(1)(H), these provisions *use* "accrued benefit." These cases do not show that age 65 is the measure when a provision does *not* use the term.

Nor does the court's decision conflict with *Miller* v. *Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871 (9th Cir. 2006). *Miller*, too, dealt with a provision that, unlike § 204(b)(1)(H), uses the term "accrued benefit." The court of appeals acknowledged *Miller*'s statement that interest credits in defined benefits plans are "not analogous to the investment growth of a defined contribution," inasmuch

as "[i]nterest in a defined-contribution plan is real, while interest credits in a defined-benefit plan are bookkeeping entries." Pet. App. 10. But the court observed that this is a distinction without a difference for purposes of an age-discrimination analysis.[6]

Transition Formula. The court's rejection of Petitioners' challenge to IBM's "always cash balance" transition formula does not conflict with *EEOC* v. *Jefferson County Sheriff's Dep't*, 467 F.3d 571 (6th Cir. 2006). *Jefferson County*, too, did not construe § 204(b)(1)(H) or involve a cash balance plan or a transition from one pension formula to another. *Jefferson County* simply held that a "facially discriminatory" disability plan is *prima facie* age-discriminatory under the ADEA. *Id.* at 573, 576 ("[T]he KRS plan is facially discriminatory on the basis of age"; "an employee who is 55 or older cannot receive disability retirement benefits."). IBM's "always cash balance" formula is age-neutral: Under the formula, every employee with the same salary and service record received the same opening account balance. Pet. App. 12. Under

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[6] Six of the nine district court decisions addressing the issue have held that cash balance plans are not age-discriminatory. See *Drutis* v. *Quebecor World (USA), Inc.*, No. 04-269-KSF, slip op. at 11 (E.D. Ky. Sept. 25, 2006), *appeal pending*, No. 06-6380 (6th Cir.); *Register* v. *PNC Fin. Servs. Group, Inc.*, No. 04-CV-6097, 2005 WL 3120268, at *7 (E.D. Pa. Nov. 21, 2005), *appeal pending*, No. 05-5445 (3d Cir.); *Tootle* v. *ARINC, Inc.*, 222 F.R.D. 88, 94 (D. Md. 2004); *Eaton* v. *Onan Corp.*, 117 F. Supp. 2d 812, 832-33 (S.D. Ind. 2000). District courts in the Second Circuit are divided. Compare *Laurent* v. *PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 553-54 (S.D.N.Y. 2006) (lawful); *Hirt* v. *Equitable Ret. Plan*, 441 F. Supp. 2d 516, 551 (S.D.N.Y. 2006) (same), *appeal pending*, No. 06-5190 (2d Cir.), and *In re Citigroup Pension Plan ERISA Litig.*, 05 Civ. 5296 (SAS), 2006 WL 3613691 (S.D.N.Y. Dec. 12, 2006) (unlawful); *Richards* v. *FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150, 164-65 (D. Conn. 2006) (same); *In Re J.P. Morgan Chase Cash Balance Litig.*, No. 06 Civ. 732 (HB), 2006 WL 3063424, at *4 (S.D.N.Y. Oct. 30, 2006) (same).

the *Jefferson County* disability plan, moreover, older employees fared worse than younger employees. See 476 F.3d at 576. Under the IBM transition formulas, older employees received an opening balance no lower than younger employees with the same salary and service history, and in most cases received a substantially larger opening balance.

III. THE PENSION PROTECTION ACT OF 2006 RESOLVES THE ISSUE IN THIS CASE FOR THE FUTURE.

Petitioners assert that the "legal consequences of the Seventh Circuit's error are not confined to ERISA age discrimination claims," Pet. 24, but Petitioners do not say what those consequences will be. In fact, there will be none. The PPA provides, prospectively, that cash balance plans comply with the nation's age discrimination statutes. The PPA further provides that a cash balance plan's compliance with § 204(b)(1)(H) and its counterpart ADEA and IRC provisions may be determined by looking to the annual growth of a participant's cash balance account, as the court of appeals did here. Because Congress has affirmed the legality of cash balance plans going forward, review of the meaning and application of § 204(b)(1)(H) is unwarranted. Regardless of any particular outcome in this or any other pending case, cash balance plans will continue to provide employee benefits as a lawful, non-discriminatory feature of the pension system.[7]

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[7] The alleged PPA requirements that Petitioners cite, Pet. 27 n.6, are not applicable to employers like IBM. IBM's Plan is exactly the type of plan that Congress has made clear is legal in the PPA.

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